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No. 87-971

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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ANITA KAYE LOFTIN-BOGGS,
*Petitioner*

v.

CITY OF MERIDIAN, MISSISSIPPI, JAMES L. GARRETT, SR., Individually and as City Engineer and Director of Public Works, and NEAL CARSON, Individually and as Assistant Director of Public Works,
*Respondents*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Rule 3(c) of the Federal Rules of Appellate Procedure requires the appellant to designate the order or judgment being appealed. Loftin-Boggs' notice of appeal specifically designated only the district court's order ruling on the post-trial motion that dealt with her § 1983 and state-law jury claims. Did the United States Court of Appeals for the Fifth Circuit err when it ruled it had no jurisdiction to consider Loftin-Boggs' appeal of the dismissal of her non-jury Title VII claim because the notice of appeal did not refer to any order dealing with the district court's dismissal of that claim?

2. Respondents accept the second question as presented by the petitioner.

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## RESPONDENTS' BRIEF IN OPPOSITION

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### STATEMENT OF THE CASE

Petitioner Loftin-Boggs' chemist position in the city of Meridian's waste water treatment plant was reclassified down to a laboratory technician position, resulting in a $4,000 reduction in annual salary. Claiming the reclassification constituted a constructive discharge, petitioner, acting through her retained counsel, John L. Maxey, II, filed suit in federal district court against the respond-

ents, City of Meridian, Garrett and Carson, asserting a non-jury Title VII claim and jury claims under 42 U.S.C. § 1983 and state-law.

The Title VII claim charged the respondents with sexual harassment, sexual discrimination and and retaliation. Loftin-Boggs' § 1983 claim alleged the respondents violated the First Amendment because they constructively discharged her for filing a grievance in which she complained about her employment conditions and that they violated the Fourteenth Amendment because they failed to give her a due process hearing before discharging her. No equal protection claim for sex discrimination was made under § 1983. The state-law slander claim was made only against respondent Garrett. (Vol. 2 at 156-72)[1]

A consolidated trial was held on the Title VII non-jury claim and the § 1983 and pendant state-law jury claims. At the conclusion of the 6-day trial, the district court on April 21, 1986, directed a verdict for the respondent Garrett on the state-law claim, submitted the § 1983 claims to a jury, which returned a verdict for the respondents, and took the non-jury Title VII claim under advisement. (Vol. 7, 1138-40; Vol. 2, 371; Supp. App. at 1-4). After the entry of the directed verdict and the return of the jury verdict, the following actions occurred:

1. On April 28, 1986, the district clerk filed the district court's Partial Judgment which dismissed the state-law and § 1983 claims. (Vol. 2, 390-91; Supp. App. at 7-8).

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[1] Citations are to the volume and page number of the record sent to the court of appeals and where available, to the Appendix (App.) or Supplemental Appendix (Supp. App.) filed by Loftin-Boggs with this Court.

2. On May 2, 1986, the district court issued its Memorandum Opinion finding that Loftin-Boggs had failed to establish her Title VII claim. (Vol. 2, 392-403; Supp. App. at 9-20).

3. On May 7, 1986, Loftin-Boggs, acting through Mr. Maxey, served a Rule 50 and 59 motion in which she asked the district court to grant a judgment notwithstanding the verdict or, alternatively, a new trial on her § 1983 and state-law claims. (Vol. 2, 404-06).

4. On May 8, 1986, the district court entered a Final Judgment incorporating by reference the Partial Judgment filed on April 28, 1986, and the Memorandum Opinion of May 2, 1986, and dismissed with prejudice all claims, to include the Title VII claim. (Vol. 2 at 407-08).

5. On June 17, 1986, the district court entered its Memorandum Opinion and Order denying Loftin-Boggs' post-trial motion. (Vol. 2 at 412-14; Supp. App. at 21-23).

On July 16, 1986, Loftin-Boggs, acting *pro se*, filed her notice of appeal. This was the first time Loftin-Boggs had undertaken to represent herself in this action. In the notice of appeal, Loftin-Boggs stated she was appealing "from the Memorandum Opinion and Order dated June 17, 1986." (Vol. 2 at 418; App. at 1a).

After the transcript and record were prepared, Loftin-Boggs in the latter part of December, 1986, again retained Mr. Maxey to represent her. Mr. Maxey prepared and filed all of Loftin-Boggs' appeal briefs.

Loftin-Boggs' initial brief to the court of appeals was served on February 13, 1987, and urged the court of appeals to reverse the district court on its dismissal of the Title VII claim and on its granting of a directed verdict on the state-law slander claim.

Respondents moved to dismiss for lack of jurisdiction Loftin-Boggs' appeal of her Title VII claim. Respondents

argued that the motion should be granted because the order designated in the notice of appeal dealt only with the § 1983 and state-law jury claims and because Loftin-Boggs had not designated any order or judgment dealing with the non-jury Title VII claim. After considering Respondents' motion and brief and the brief of Loftin-Boggs, which was prepared by and submitted through Mr. Maxey, the court of appeals on June 1, 1987, issued its order which stated in full: "IT IS ORDERED that the motion of appellee(s) to dismiss certain issues on appeal for lack of jurisdiction is GRANTED."[2] On June 16, 1987, Mr. Maxey filed a motion with the court of appeals requesting permission to withdraw as counsel of record because he had been instructed by Loftin-Boggs to "perform no further work in this matter." Loftin-Boggs joined in the motion and it was sustained by the court of appeals.

On July 10, 1987, the court of appeals issued its unpublished opinion affirming the district court's directed verdict on the state-law slander claim. (App. at 2a-7a).

On August 24, 1987, Loftin-Boggs, *pro se*, filed with the court of appeals a petition for panel rehearing, in which she asked the court to reconsider its affirmance of the directed verdict on the state-law slander claim, and a suggestion for hearing en banc, in which she asked the full court of appeals to reverse the panel decision that dismissed for lack of jurisdiction the appeal of her Title VII claim. On September 17, 1987, the court of appeals denied both requests. (App. at 8a-9a).

On December 14, 1987, Loftin-Boggs, acting again through her retained attorney, Mr. Maxey, filed the petition for writ of certiorari now pending before the Court.

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[2] This order is not included in Loftin-Boggs' Appendix or Supplemental Appendix.

With regard to the statement of facts as they relate to the second question presented in the petition, respondents incorporate by reference the facts set forth in the court of appeal's unpublished opinion. (App. at 5a-7a).

## REASONS FOR DENYING THE WRIT

Loftin-Boggs' Title VII claim was dismissed by the court of appeals because she did not follow the clearly stated and easily understood requirement of Rule 3(c). As stated by Loftin-Boggs in her petition, this Court, the Fifth Circuit and other courts of appeal generally apply a liberal construction to a notice of appeal and permit an appeal to proceed as long as the notice of appeal clearly expresses an intent to appeal from a specific order or judgment. Loftin-Boggs' notice of appeal is not aided by such a liberal construction. The June 17, 1986, order designated in Loftin-Boggs' notice referred only to the § 1983 and state-law slander jury claims and under a liberal construction, does not express or indicate any intent to appeal from any order or judgment dealing with her Title VII non-jury claim.

Loftin-Boggs does not challenge the legal rationale of the "vortex public figure" or "limited purpose public figure" test applied by the court of appeals to her state-law slander claim. Her only complaint is that the court of appeals did not properly apply the test to the specific facts surrounding her claim. Her challenge overemphasizes the part played by the newspaper articles in the district court's and the court of appeal's decision. Other facts were involved in the lower courts' analysis and when those facts are considered, it is clear that Loftin-Boggs was a "vortex" or "limited purpose public figure".

**I. DID THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERR WHEN IT RULED IT HAD NO JURISDICTION TO CONSIDER LOFTIN-BOGGS' APPEAL OF THE DISMISSAL OF HER NON-JURY TITLE VII CLAIM BECAUSE THE NOTICE OF APPEAL DID NOT REFER TO ANY ORDER DEALING WITH THE DISTRICT COURT'S DISMISSAL OF THAT CLAIM?**

Rule 3(c) of the Federal Rules of Appellate Procedure states in part: "The notice of appeal . . . shall designate the judgment, order or part thereof appealed from; . . . ." In *C. A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981), the court of appeals explained when and why it would liberally construe a notice of appeal in determining whether it met the "designation" requirement of Rule 3(c):

> . . . . [A] policy of liberal construction of notices of appeal prevails in situations where the intent to appeal an unmentioned or mislabeled ruling is apparent and there is no prejudice to the adverse party . . . . The party who makes a simple mistake in designating the judgment appealed from does not forfeit his right of appeal where the intent to pursue it is clear . . . . Also, where claims or issues are inextricably entwined, each may be reviewed even though not referred to in the notice of appeal . . . .

649 F.2d at 1056 (citations omitted).

As noted by Loftin-Boggs in her petition, this Court and other circuits have adopted this approach. See Petition at 5-6 & n.2.

In *C. A. May Marine Supply Co. v. Brunswick Corp.*, the court of appeals went on to distinguish the above-described situation from the situation where an appellant specifically designates one order or judgment but does not designate another unrelated order or judgment:

> Where the appellant notices the appeal of a specified judgment only or a part thereof, however, this

> court has no jurisdiction to review other judgments or issues which are not expressly referred to and which are not impliedly intended for appeal . . . . In this situation, because the intent to appeal is not apparent, prejudice to the adverse party is likely to result if review is granted. Where parts of the judgment are truly independent, there is more likelihood that the designation of a particular part in the notice of appeal will be construed as an intent to leave the unmentioned portions undisturbed.

649 F.2d at 1056.

Loftin-Boggs does not address this situation and does not point to any decision by this Court or by any other court of appeals which disagrees with the Fifth Circuit's rule for interpreting this type of notice of appeal. In fact, several other circuits have also interpreted notices of appeal designating a specific order in the same manner. *E.g.*, *Brookens v. White*, 795 F.2d 178, 180 (D.C. Cir. 1986) (Per curiam); *McLaurin v. Fischer*, 768 F.2d 98, 101-02 (6th Cir. 1985); *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1374-75 (11th Cir.), *cert. denied*, 464 U.S. 893 (1983); *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252, 1254 (3rd Cir. 1977); *accord, Ingraham v. United States*, 808 F.2d 1075, 1080 (5th Cir. 1987).

Having failed to show any conflict with this Court's prior decisions or the decision of any other court of appeals, it becomes apparent that Loftin-Boggs' only basis for her petition on this question is her argument that the court of appeals was wrong in its decision to dismiss her Title VII claim for lack of jurisdiction. She is wrong on this point. The cases Loftin-Boggs cites to support her argument (Petition at 5-9), all involved a situation where the order mentioned in the notice of appeal was clearly related to the unmentioned or misdesignated order. That is not the case here.

The June 17, 1986, order designated in the notice of appeal dealt only with the § 1983 and state-law slander

claims. It had nothing to do with Loftin-Boggs' non-jury Title VII claim.

Although the Title VII, the § 1983 and the state-law slander claims all arose out of Loftin-Boggs' employment relations with one or all of the respondents, that relationship, standing alone, does not mean that the issues and law involved in those claims are "inextricably entwined". A review of the claims shows that they certainly are not. The Title VII non-jury claim alleged sexual discrimination and harassment and retaliation. On the otherhand, the § 1983 jury claim charged respondents with violating Loftin-Boggs' First Amendment right to freedom of expression and her Fourteenth Amendment right to procedural due process and the state-law slander claim was based upon common-law tort concepts and the First Amendment's concept of the "vortex" or "limited-purpose" public figure.

It takes more than a liberal construction of Loftin-Boggs' notice of appeal to infer that she intended to appeal her Title VII claim when she designated the June 17, 1986, order. To do that a court must completely ignore the requirements of Rule 3(c).

## II. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY AFFIRMED THE LOWER COURT'S DISMISSAL OF HER SLANDER CLAIM ON THE GROUND THAT PETITIONER WAS A VORTEX PUBLIC FIGURE

Loftin-Boggs points to no decision by this Court or by any other court of appeals which conflicts with the "limited-purpose public figure test" applied by the Fifth Circuit in affirming the district court's granting of a directed verdict on Loftin-Boggs' state-law slander claim. Loftin-Boggs' only complaint is that the test was not properly applied to the facts of her claim. For the reasons set forth in the district court's and the Fifth Circuit's opinions, respondents contend that Loftin-Boggs is

wrong. See Appendix at 2a-7a; Supp. App. at 2-3, 21-23.

## CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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